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No. 722

In The

Supreme Court of the United States

October Term, 1956

George A. Landell, Executor, etc. et al.,
Petitioners,

v.

Northern Pacific Railway Company,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January 1957.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

George A. Landell, executor, Robert W. Lishman, trustee, and the Committe of Minority Stockholders, solely as a committee, on behalf of themselves and of other minority stockholders of the Northern Pacific Railroad Company, a Federal railroad corporation with valuable franchises, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on October 11, 1956, affirming the December 21, 1955 order of the United States District Court for the District of Columbia denying relief from the operation of a summary judgment of dismissal based on alleged laches.

OPINIONS BELOW

The December 21, 1955 order of the United States District Court for the District of Columbia denying petitioners' motions to review taxation of costs and to set aside, vacate, modify or correct the summary judgment dismissing the complaint, was made without opinion (R. 43). The per curiam opinion of the United States Court of Appeals for the District of Columbia Circuit, is not yet reported. It, together with the Judgment, is printed in Appendix B hereto, infra, pp. 31, 32.

The order of the Court of Appeals dated November 19, 1954, denying without prejudice petitioners' motion to exclude from printing in the joint appendix certain material designated by the respondent is also printed in Appendix B hereto, infra p. 32.

The summary judgment of the District Court was made on June 29, 1954 (R. 2). The order on the mandate affirming this judgment was filed November 23, 1955 (R. 5). Petitioners' motions to review taxation of costs and to vacate, modify or correct the summary judgment were filed on November 28, 1955 (R. 6).

The earlier opinions in this case by different judges of the District Court (98 F. Supp. 479; 122 F. Supp. 253), and by the Court of Appeals (223 F. 2d 316), are contained in Appendix A pp. 1a et seq., 8a et seq., to the petition for certiorari No. 299, October Term, 1955 of this Court (350 U.S. 844), hereinafter referred to as "Pet. 1."

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 11, 1956 (R. 46). A timely petition for rehearing was denied on November 2, 1956 (R. 73). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a complaint by petitioners, holders of about 3% of the stock, against respondent, managing stockholder and holder of 97% of the stock of the Federal Railroad corporation, seeking to have the courts define the franchise and other assets of the corporation and enforce the statutory and fiduciary accountability of the respondent for its use and management of the assets, is subject to a summary judgment of dismissal for laches which denies petitioners the opportunity of litigating the following disputed issues: (a) that the facts necessary for laches and its applicability are not present; (b) that the Federal corporation has valuable federal franchises and immunities granted solely to it by Congress and other assets of great value; (c) that the respondent is unlawfully keeping to itself all the benefits of such franchises and other assets; and (d) that in order to continue its unlawful use of such franchises and other assets and to procure immunity from suit, the respondent has used and is using the forms of legal procedure as an unlawful device to make itself appear to be the owner of the franchises and other corporate assets and to make it further appear that the Federal corporation in question is a bankrupt entity against which the respondent holds an alleged unsatisfied judgment in excess of $100,000,000.

2. Whether petitioners, who moved under Rule 60(b)(6) of the Federal Rules of Civil Procedure for relief from the operation of the summary judgment, are required under the Rule to prove that the judgment was fraudulently procured, or are they entitled to relief when the record and the pleadings [1] establish that the following circumstances are present:

---

[1] The pleadings are printed on pages 1 et. seq., of the Record in Pet. 1.

a. The summary judgment record on which the decision below is based contains a treacherous mass of misleading, nonevidentiary material and the case has never been placed in proper condition for appellate consideration despite petitioners' efforts in the courts below (R. 8, 23, 34, 35, 40, 50-55).

b. The Court of Appeals by order dated November 19, 1954, denied petitioners' motion (Appendix B, infra, p. 32) to exclude voluminous, nonevidentiary material from printing in the Joint Appendix "without prejudice to the right of counsel for appellant to file a motion to tax costs for printing unnecessary portions of the record after hearing and disposition of this appeal." This material was chiefly composed of exhibits caused to be marked by respondent for identification only upon a deposition which was used in violation of Rule 26 of the Federal Rules of Civil Procedure. These exhibits were presented to the appellate court by the respondent as evidence and labelled by respondent in volume 2 of the Joint Appendix and caused to be printed by it therein as "Exhibits." The words on the back of each such "exhibit" saying: "Defendant's Exhibit for Identification" were deleted without explanation (R. 8, 23, 49-52, 61). Respondent has thus been allowed to load the summary judgment record with an unchecked hand and this material has been used as the basis for the summary judgment and appellate decision (R. 8, 23, 48-52, 58, 61, 62). The circumstances herein are such that the motion under Rule 54(d) to review the taxation of costs for the printing of excessive and non-evidentiary material, as well as the motion under Rule 60(b)(6), necessarily involve a fundamental due process attack upon the summary judgment and its affirmance by the Court of Appeals. See infra, p. 11.

c. The decision below is based upon: (1) refusal to give effect to governing legislation and to well pleaded allegations of fact in the complaint, (2) numerous, undisputedly, erroneous statements of material fact contained in the summary judgment opinion (R. 11-25), (3) errors of law depriving petitioners of fundamental rights (R. 8, 48, 50, 53-58, 63, 65), (4) findings in a summary judgment opinion of disputed material facts, and (5) reliance upon undisputedly,

erroneous statements made to the courts by the respondent (R. 34-39, 64, 65).

d. The decision below denies petitioners the opportunity to prove at a trial, by respondent's records and otherwise, that a decree of 1896 against the Federal corporation procured by and relied upon by respondent, is neither conclusive of petitioners' statutory property rights, nor a bar to the relief prayed for.

e. The summary judgment below and the denial of the motion for relief from its operation unlawfully adjudicates the contested issue that the principal precedent relied upon by the courts below, (unreported 1939 decision in the *Hoover* case), to support the charge of petitioners' laches was a sham decision obtained collusively by suppression of material, evidence in possession of both parties to that case when it was decided, and that petitioners were not aware of this suppression before bringing the current action (R. 9, 10, 17-20, 36).

f. The District Court's summary judgment opinion misapprehends and misstates the cause of action alleged by the complaint (R. 12-16, 53, 62) and misstates material facts as developed by the pleadings and the record, in determining the applicability of the principal precedent relied upon (R. 17-25, 36). The decision that the opinion was "careful" is plainly obstinate error.

g. The decision below denies petitioners their fundamental right to an adjudication of the following matters in dispute: (1) whether respondent is now lawfully using the assets of the Federal corporation, (2) whether it is misleadingly using the forms of legal procedure to make itself appear to be such lawful user and to keep itself immune from effective litigation (R. 15, 16, 40, 48, 52, 54, 60, 62, 65) and (3) whether the reorganization of the Federal corporation commenced in 1896, in which no provision was made for minority shares, is yet complete in view of the federal statute, the refusal of Congress to authorize respondent's succession, and of respondent's own actions in keeping alive and using the Federal corporation's charter, franchises, stocks, bonds and other securities.

h. The decision below nullifies the provisions contained in the federal statute incorporating the petitioners' company which prohibits the transfer to respondent of its charter powers, privileges and franchises and vests continuing property rights in the petitioners (R. 13, 53, 56, 63).

3. Whether the rule of "law of the case" serves to bar the petitioners from relief from the operation of the decision below in the light of the foregoing and the following facts and circumstances:

a. Petitioners or their predecessors never declined an offer to participate in the reorganization upon the same terms as all other stockholders. They were frozen out by insider stockholders and others intent on using the forms of legal procedure to acquire for respondent en bloc, 35,000,000 acres of the public domain contrary to statute and to pocket the assessments levied upon non-insider stockholders (R. 37, 38). Yet the respondent in its brief pages 1, 2 in this Court opposing the first petition for certiorari (No. 299, 350 U.S. 844), with no basis in, and directly contrary to the record, and contrary to the admission in its Answer herein (R. 37, 38), and to its testimony contained in the record in this Court in another case (*Minnesota Rate Cases*, 230 U.S. 352 (1913), defendant's Exhibit Y, Gray, Volume IX of printed record therein; see R. 37, 38, 64), erroneously and misleadingly stated to this Court that:

"On motion for summary judgment below, it was established by undisputed documentary evidence[2] coming largely from petitioners' own files: (a) that petitioners or their predecessors had declined an offer to participate in the reorganization upon the same terms as all other stockholders. . ."

b. Subsequent to the summary judgment and to the denial of certiorari by this Court (350 U.S. 844), respondent has continued to use the Fed-

[2] At page 14 infra, petitioners state facts showing the misleading and prejudicial nature of the words "undisputed documentary evidence." Respondent has made no attempt to show the truth of its statement. It is reasonable to conclude that it was an intentional misstatement, designed to prejudice this Court's view of the nature of this case (R. 64).

eral corporation's charter, privileges, and franchises and has caused notices of stockholders' meetings of the Federal corporation to be sent to petitioners (R. 10, 56).

CONSTITUTIONAL PROVISIONS, STATUTE AND RULES INVOLVED

The constitutional provisions involved are those in Amendment V and are printed in Appendix A, infra, p. 26.

The statutory provisions involved are the Act of July 2, 1864 (13 Stat. 365), as amended. They, together with the provisions in Rule 56 of the Federal Rules of Civil Procedure, are printed in Appendix B to Pet. 1, pp. 20a et seq.; pp. 38a, 39a.

The other Rules involved, namely, Rules 26, 54(a), (d) and 60(b) of the Federal Rules of Civil Procedure are printed in Appendix A, infra, pp. 26 et seq.

STATEMENT

This case is here for the second time, see 350 U.S. 844. On December 20, 1950, petitioners, who are holders as executor and trustees of about 3% of the outstanding stock of the Northern Pacific Railroad Company, a Federal railroad corporation, brought this action against respondent, a Wisconsin corporation, holder of 97% of the Federal corporation's stock.

Petitioners invoked the jurisdiction of the United States District Court for the District of Columbia on the ground that the Act of July 2, 1864, 13 Stat. 365, as amended, (printed in Appendix B to Pet. 1), granted valuable franchise and other assets solely to railroad and that, in violation of this statute and in breach of its fiduciary duty toward the minority, respondent is using and enjoying these assets without making any compensa-

tion therefor to the Federal corporation or to the petitioners. Petitioners also invoked the general equity jurisdiction of the District Court under 11 D.C. Code, Sections 301 and 305, as amended, and sought a decree defining the assets of the Federal corporation, the extent of the petitioners' interest therein and the extent of the fiduciary liability of respondent for its holding and management of the Federal corporation's charter powers, franchises and privileges.

The complaint alleged that respondent is incompetent to be and is not the lawful successor to the Federal corporation (R. 12-16). It alleged that by use of the forms of legal procedure, respondent contrived to make itself appear to be such successor and thereby manage and enjoy the federally granted railroad franchises and other assets with immunity from effective litigation (R. 12-16, 39, 53, 59, 60). The complaint also alleged that from 1896 to date respondent "has planned and conducted its business and mortgage financing in a manner so as to keep itself in a position of ability to transfer and convey the railroad of Northern Pacific Railroad Company it purportedly acquired in the years 1896 to 1899 back to said Federal corporation now dominated and controlled by it." (R. 58). The answer "specifically" denied this allegation (R. 58). Since the case was last here, respondent has used the Federal corporation's franchises and other assets and has caused notices of stockholders' meetings of the Federal corporation to be sent to petitioners (R. 10, 49, 56).

On March 9, 1951 the District Court, with an opinion by Judge McLaughlin (98 F. Supp. 479), denied respondent's motion to dismiss the complaint.

On June 23, 1954 the District Court, with an opinion by Judge Tamm (122 F. Supp. 253), granted respondent's motion for summary judgment and dismissed the complaint for laches.

On November 19, 1954 the Court of Appeals for the District of Columbia Circuit (Stephens, Chief Judge, Bazelon and Danaher, Circuit Judges) denied without prejudice petitioners' motion to exclude from printing certain material designated by the respondent (Appendix A, infra, p. 32).

On April 14, 1955 the Court of Appeals (Circuit Judges Prettyman, Bazelon and Bastian) affirmed the summary judgment in a short, per curiam opinion (223 F. 2d 316). On May 11, 1955, that court denied a petition for rehearing.

On October 10, 1955, No. 299, 350 U.S. 844) this Court denied petitioners' application for certiorari and on November 21, 1955 denied the petition for rehearing (350 U.S. 905).

On November 23, 1955 there was entered on the docket of the District Court an order on the mandate of this Court affirming the summary judgment of the District Court dismissing the complaint with costs (R. 5).

On November 28, 1955 petitioners, as they were entitled to do under the law and under the aforesaid order without prejudice of November 19, 1954, filed two motions in the District Court. One was under Rule 54 to review taxation of costs and the other was under Rule 60(b) to secure relief from the operation of the summary judgment (R. 6).

On December 21, 1955 Judge Tamm entered the order, without opinion, denying petitioners' two motions (R. 43).

On October 11, 1956 the Court of Appeals in another short-shrift, per curiam opinion (Appendix A, infra, p. 31), affirmed the December 21st order. On November 2, 1956, that court denied a petition for rehearing (R. 47, 73).

Petitioners' theory of the case is one which would enable this litigation to be narrowed, simplified and perhaps

to be disposed of at a pre-trial conference. A federal statute, still in effect, gives petitioners property rights in valuable assets of the Federal railroad corporation. These assets are the charter, right of way and franchises granted by Congress solely to Northern Pacific Railroad Company. Respondent is using and enjoying the benefits of these inalienable assets without making any payment to the Federal corporation which it holds and uses as a captive to do its bidding. To make its possession, management and enjoyment of these assets appear lawful and to procure immunity from effective litigation, respondent has used and is using the forms of legal procedure as a device, cover and shield. The infirmity of the summary judgment and of the decision below is that each constitutes a violation of petitioners' fundamental right to the observance of the federal statute, to a fair hearing and to an appellate review of the genuine issues of material fact and law, going not only to the question of the existence of laches, but also to its applicability. Where undisputed facts set forth in the second appeal record make a clear showing that the earlier adjudication was plainly wrong, it is manifestly unjust to apply the self imposed rules of repose or of law of the case.

Respondent's theory of the case, which was accepted by the District Court, is that petitioners' cause of action arose in 1896 and that a fair trial could not now be had because all participants in the reorganization are dead. Respondent successfully contended that the court should not be concerned with whether the provisions in the federal statute are now operative, or whether respondent has legal title to the Federal corporation and its franchise and other assets noted above. In its briefs below, and on oral argument before the District Court on the motion for summary judgment, respondent stated that it was "not in order" to discuss or consider these matters (R. 40). Its counsel told the District Court (R. 56): "I am not here now to maintain whether the 1896 reorganization was legal or not. . ." He also stated that "whether

it gives us valid, legal title or not, at the present time[3], it is not necessary to consider."

The decision below, when sufficiently scrutinized, rests upon the specious basis that respondent is not obliged to meet any issue or fact which it does not feel is "in order." See infra, p. 24.

The decision of the court below states that Landell appealed from the summary judgment "using as procedural justification the feature of costs." Infra, p. 31. This statement loses sight of the vital contention that respondent loaded the record with a mass of misleading, nonevidentiary material which the District Court used as the basis for the summary judgment. Furthermore, the decision overlooks the order of November 19, 1954, which provided ample justification for the present appeal (R. 49-52, see supra, p. 4).

Petitioners now petition this Court for a writ of certiorari to the Court of Appeals, for the reasons set forth below:

REASONS FOR GRANTING THE WRIT

1. Lack of Procedural Due Process and of Jurisdiction. The decision of the court below states that the questions are no longer open whether the summary judgment: (a) adjudicated genuine issues of material fact, (b) was based upon material never offered in evidence, and (c) upon undisputedly, erroneous statements of fact contained in the opinion itself. The decision also holds that petitioners, in order to obtain relief from the operation of the summary judgment, must establish that there was fraud in its procurement, infra, p. 31. Petitioners contend that the decision deprives them of procedural due

[3] Footnote supplied. Section 4, Act of June 25, 1929, c. 41, 46 Stat. 41, Appendix B, p. 36a to Pet. 1, recognizes that the Federal corporation has "present title" to the right of way.

process, misconstrues the provisions contained in Rule 60(b), is in direct conflict with governing decisions of this Court, is beyond the court's jurisdiction and constitutes a miscarriage of justice.

a. The minimum requirements of due process are that no man shall be condemned in his person or his property without a hearing or trial wherein he has had fair opportunity to test as to its truth, relevancy or competency the material used against him. In the present case the summary judgment uses nonevidentiary material and makes findings of disputed facts which findings were not made known to petitioners until the District Court issued its opinion and judgment. The findings of disputed facts, the use of nonevidentiary material and the approval of such procedure by the Court of Appeals is a denial of due process. See *Morgan* v. *United States,* 304 U.S. 1, 17, 19, 20 (1938).

In *Fountain* v. *Filson,* 336 U.S. 681, 683 (1949) this Court stated part of the governing law which has been ignored in the present case: "Summary judgment may be given, under Rule 56, only if there is no dispute as to any material fact." The decision below is that the District Court may adjudicate disputed material facts and in a summary judgment opinion make findings of fact contrary to well pleaded allegations in the complaint.

The findings of fact contained in the summary judgment opinion, moreover, violated the principle that findings of fact, to be valid, must be based upon evidence in the record. *Postal Cable Co.* v. *Newport,* 247 U.S. 473, 474 (1917), *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 432 (1935).

The summary judgment is not entitled to the merit and finality of an adjudication between the parties because it is unresponsive to the pleadings (R. 12-16, 23-25, 39, 40, 52, 55, 56, 58, 61). *Reynolds* v. *Stockton,* 140 U.S. 254, 264, 265, 268 (1891), *Standard Oil Co.* v. *Missouri,* 224 U.S.

270, 281 (1912). There is a serious additional question as to the judgment's validity. The jurisdiction of the District Court is limited to granting summary judgment to cases wherein there are no triable issues, and the moving party "is entitled to a judgment as a matter of law" (Rule 56 (c)). The statute provides present property rights in the petitioners. Respondent was not entitled to a judgment based upon the exclusion of the federal statute from the case. The court, moreover, had no jurisdiction to enjoin enforcement of the statute or to render judgment contrary to its terms. It cannot achieve the same non-jurisdictional result by indirection.

The summary judgment, furthermore, fails to make findings concerning the most vital issues in the case, all of which were in sharp dispute, namely, (1) the factual elements of laches and whether the facts herein are susceptible to the claim of laches; (2) whether petitioner has title to the charter and franchises of the Federal corporation and is now lawfully using same; (3) whether respondent has conducted its affairs with deference to the rights of the minority stockholders; (4) whether by misuse of the forms of legal procedure respondent has hindered and prevented the commencement of effective litigation against it (R. 59); (5) whether the 1939 unreported, alleged class action *Hoover* case relied upon by the courts below was a sham decision obtained by collusive suppression of basic documentary evidence then in possession of both parties (See supra p. 5). See *Hansberry* v. *Lee*, 311 U.S. 32, 45 (1940).

b. The decision below that the District Court may adjudicate issues in a summary judgment proceeding under Rule 56 and make findings of material fact which have no basis in the record, deprives petitioners of their fundamental right to a fair trial and a trustworthy appellate record and is in direct conflict with the decisions of this Court (See R. 52, 55, 57-60). *Sartor* v. *Arkansas Gas Corp.*, 321 U.S. 620, 627 (1944); *Kennedy* v. *Silas Mason*

Co., 334 U.S. 249, 256, 257 (1948); *Fountain* v. *Filson*, 336 U.S. 681, 683 (1949), see *Hovey* v. *Elliott*, 167 U.S. 417, 418 (1897).

c. The decision below holding: (1) that this case is not in proper posture to permit attack upon the summary judgment, (infra, p. 31) and (2) that petitioners in order to obtain relief from its operation must under Rule 60(b) (6) establish that the judgment was fraudulently procured is in direct conflict with applicable decisions of this Court.

(1) Rule of law of the case. The decision that the rule of law of the case prevents the present attack upon the summary judgment is in conflict with *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912).

In determining whether the rule of law of the case precludes the present proceedings, this Court, we respectfully urge, should take the following matters into consideration. What respondent described to this Court in its brief opposing the first certiorari petition as "undisputed documentary evidence" (supra p. 6) is material which respondent was permitted to inspect prior to the summary judgment motion and was never offered in evidence (R. 8, 23, 51). Much of this material respondent already had in its own files. Respondent had this material marked for identification purposes only upon the deposition herein. Judge Tamm was asked to exclude it as irrelevant and incompetent and not properly vouched for (R. 23, 49, 50). No ruling was made upon this request (R. 51). As noted above, the Court of Appeals denied without prejudice petitioners' motion to exclude a large volume of same from printing in the Joint Appendix (R. 23, 50-52,). Had the case reached this court on the merits, respondent would have found it impossible to comply with Rule 40, 2. of the Rules of this Court requiring its brief, when referring to an exhibit, to indicate "both the page number at which the exhibit appears and at which it was offered in evidence. . ." The District Court acted con-

trary to this rule. Thus the summary judgment opinion uses as "Lishman Deposition, p. 180, Exhibit 100" (R. 23) a 1916 letter from Mr. McCullen to Mr. Stetson. This letter, contrary to Judge Tamm's reference to it as an "exhibit", was never offered in evidence. As shown at page 180 of the deposition it was marked solely for identification as appears from the following statement thereon: "Thereupon a letter dated March 29, 1916 from Mr. McCullen to Mr. Stetson was marked by the Reporter 'Defendant's Exhibit No. 100 for Identification.'" For the District Court to refer to and use this paper marked for identification as an "exhibit", and for the respondent to describe this type of material as "undisputed documentary evidence", was misleading and substantially prejudicial to petitioners' fundamental right to a fair hearing and to an appellate review free from deceptive misstatements concerning the question presented (R. 37-39). The summary judgment opinion, contrary to the complaint, uses this letter "exhibit" to determine that the cause of action was one for concealed fraud concerning which petitioners had offered no satisfactory excuse for their failure to sue R. 22, 23, see 9). This use misapprehends the complaint allegations of fact setting forth respondent's misuse of the forms of legal procedure to make itself appear to be the lawful successor to the Federal corporation and to hinder the institution of costly litigation against powerful interest in the face of odds which respondent, by a propaganda campaign over the years, had made to appear as hopeless.

(2) Rule 60(b)(6). The decision below that petitioners must prove that the summary judgment was fraudulently procured in order to obtain relief from its operation is in direct conflict with *Klapprott* v. *U.S.*, 335 U.S. 601, 610, 615 (1949). In the *Klapprott* case this Court stated, " . . . Petitioner is entitled to a fair trial. He had not had it. The Government makes no claim that he has. Fair hearings are in accord with elemental con-

cepts of justice, and the language of the 'other reason clause' of 60(b) is broad enough to authorize the Court to set aside the default judgment and grant petitioner a fair hearing."

Furthermore, the rule is that relief from the operation of a judgment can be obtained without the necessity of proof of fraud.[4]

Thus in *Remington* v. *Central Pacific R.R. Co.*, 198 U.S. 95 (1905) this Court said, at pages 99-100: "If the Circuit Court was satisfied that it, or its predecessor state court, had made a mistake, it had power to reopen the matter."

In *Chastleton Corporation* v. *Sinclair*, 264 U.S. 543, 547 (1924) Mr. Justice Holmes pointed out: " . . . a court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . ."

See 31 Am. Jur., Judgments, sec. 639.

Our courts have the inherent power, and, under certain circumstances, the duty of self correction of an erroneous adjudication, even in the absence of a showing of fraud in its procurement. Moore and Rogers, *Federal Relief from Civil Judgments*, 55 Yale L. J. 623, 624-626, 664 (1946). The *undisputed* cincumstances herein require that in the interests of justice this power should now be exercised.

d. The decision below holding that the summary judgment cannot now be attacked on the ground that it uses

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[4] It should be noted that, like the plaintiffs in *Southern Pacific Company* v. *Bogert*, 250 U.S. 483, 487, 492 (1919), the petitioners sought to hold respondent accountable as a fiduciary, majority stockholder. In order to obtain the relief prayed for in the complaint, fraud need not be proved. "It is sufficient to establish that the fiduciary has exercised his power for his own benefit without more." *U. S.* v. *Dunn*, 268 U.S. 121, 131 (1925) Since the summary judgment, respondent has been using and enjoying the assets of the Federal corporation without compensation therefor (R. 10, 11, 56).

a deposition in violation of Rule 26 and relies upon papers caused to be marked by respondent for identification purposes only is erroneous. In using the Lishman deposition the District Court made none of the findings required by Rule 26(d)(3) (R. 8, 50.)

Respondent contends that the deposition was properly used by the court because deponent Lishman was a party (R. 29).[5] In addition, respondent states that its use was not objected to at the summary judgment motion hearing and that, in any event, the appendix to the appellants' brief in the Court of Appeals contained 16 pages of excerpts from the deposition (R. 29, 30, but see 23, 51).

Respondent offered no explanation as to why the voluminous papers it caused to be marked for identification purposes upon the deposition were caused to be labelled by it as exhibits in the printed record.

The inclusion of 16 pages of excerpts in the appellants' appendix was to establish that the taking of the Lishman deposition "was in part for the purpose of finding out whether the plaintiff committee had a copy of the unprinted exhibit submitted by defendant in 1926 to the Joint Congressional Investigating Committee" (R. 36). This exhibit showed that respondent's own 1896 records[6] listed Hoover as a consenting stockholder to the reorganization. At the time of the insistent questioning of de-

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[5] *Arnstein* v. *Porter*, 2 Cir., 1946, 154 F.2d 464, 471, 472; Barron and Holtzoff, Federal Practice and Procedure, 1950 ed., vol. 2 sec. 655, show the fundamental unsoundness of respondent's contention.

[6] The summary judgment opinion, notwithstanding that the District Court's attention had been called to the 1896 records, erroneously states that "Subsequent to dismissal of the suit [in 1939], it was learned that Hoover instead of being a bona fide non-assenting shareholder, had actually participated in the reorganization, voting some of his stock in favor of the reorganization." (R. 17, 122 F. Supp. at p. 255). The error of this statement stands undisputed.

ponent Lishman concerning whether the plaintiff committee had a copy of the unprinted exhibit, the plaintiff committee had no copy thereof. Subsequently it discovered a copy in the files of Mr. Boylan, who in 1939 as counsel for Hoover, made the motion to restore the case to the calendar after it had abated in 1904. The District Court's attention was called to these matters, a copy of the suppressed exhibit was handed up to the court, and the argument made before it: (1) that this legislative exhibit was prepared in 1926 from respondent's 1896 records and established that Hoover was not a dissenter; (2) that in 1939 Mr. Boylan, counsel for Hoover, had a copy of this document in his files; (3) that this material evidence was suppressed from the court in 1939 (R. 36, 19) and the court's 1939 decision was based upon ignorance of the fact that prosecution of the Hoover suit had abated in 1904 because Hoover had no standing to sue; and (4) that this exhibit was not discovered by the petitioners until after the taking of the deposition, when its significance had been forced home upon them by respondent's lengthy questioning of deponent Lishman as to whether the plaintiff committee had a copy of same. (R. 36).

2. Lack of Substantive Due Process and Statutory Nullification. The decision below that petitioners are not entitled to an adjudication of their property rights inherent in shares of stock in the Federal railroad corporation is directly contrary to the provisions in the federal statute and is in direct conflict with the decisions of this Court pertaining to: the scope of the judicial function; the fiduciary duty of a majority stockholder to the minority; the limitations upon the power of a railroad corporation to transfer its charter and franchises to the 97% stockholder therein, where no provisions have been made for the minority, although the assets were ample to reach them; and the incompetency of the transferee, in the absence of legislative authorization, to arrogate to itself the position of lawful ownership and enjoyment of a railroad charter and franchises.

a. The provisions contained in section 3 of the Act of July 2, 1864, (Pet. 1, Appendix B, pp. 24a, 25a): (1) vest petitioners with continuing property rights in the charter and franchises of the Federal railroad corporation, (2) prohibit the Federal corporation from transferring same and (3) render respondent incompetent to acquire and use them (R. 12-15).

In *United States* v. *Northern Pacific Railroad Company*, 8 Cir., 1899, 95 Fed. 864, aff'd 177 U.S. 435 (1900), it was determined that the main line of the railroad must, under section 3, be owned and operated by the Federal corporation, with continuing property rights in the original stockholders and their successors. At pages 876, 877 the Court of Appeals said:

> " . . . *These restrictions upon this consolidation, confederation, and association mark one of the primary objects, and insure the accomplishment of one of the great purposes, of the charter, namely, that a single corporation, the corporation created by that charter, should, in the end, own and operate a continuous railroad from Lake Superior to Puget Sound, and be subject to the call of the government* to transport its mails, its troops, and its munitions of war, and to discharge the other duties imposed by the act. The government did not make this land grant or propose to confirm or convey it to the lessee or part owner of the disjointed fragments of other railroads, but to the owner of an entire continuous railroad. It was to this end that congress studiously inserted in this proviso, not that the railroad having the previous grant might lease its railroad to the Northern Pacific Company, or rent or buy a portion of that of the Northern Pacific Company, but that it might assign its interest to that company, or might consolidate, confederate, and associate with it on the terms mentioned in the first section of the act. It might assign its railroad to the Northern Pacific Company, and thereby that company would become the absolute owner of it, or it might unite with the Northern Pacific Company on the terms mentioned in the first section of the latter's charter, and, if it did

> unite with it on those terms, the same result would follow. In either event, the Northern Pacific Company would become the absolute owner of the road of the company having the previous grant. What were the terms mentioned in the first section of the act? They were, when read in connection with the proviso in the third section, *that the company having the previous grant might become consolidated, associated, and confederated in some lawful way with Richard D. Rice and the other parties there named, or with their successors,* 'in a body corporate and politic under the name, title, and style of the Northern Pacific Railroad Company,' and that its interest should be represented by a proper proportion of the $100,000,000 capital stock authorized by that section. It was an inexorable condition of the exercise of the power of assignment or of union conferred by the second proviso in section 3 of this charter that the ownership of the railroad having the previous grant should be vested in the Northern Pacific Railroad Company." (Emphasis supplied).

See, *Roberts* v. *Northern Pacific Railroad Company*, 158 U.S. 1, 19-21, 23, 24 (1895), holding that the railroad must be operated as a continuous line by the federal corporation.

The manifest error of the decision below overriding the statute is heightened by two facts. First, the summary judgment opinion, accepted respondent's thesis (R. 40, 56) that it was not proper to consider whether respondent had present lawful title to the Federal corporation and its assets and excluded this basic issue from the proceedings. Second, since the summary judgment and the first denial of certiorari, respondent has continued to notify petitioners of stockholders' meetings of the Federal corporation. The decision below is that respondent may continue to take under the act and repudiate its obligations. This is error and is in direct conflict with: *Calhoun* v. *Massie*, 253 U.S. 170, 177 (1920) and *Northern Pacific Railway Company* v. *U.S.*, 330 U.S. 248, 257 (1947).

b. The decision below is in direct conflict with the decisions of this Court respecting the scope of the judicial function.

The courts have no power to nullify the provisions in a statute embodying an important legislative program. *Oregon & California Railroad Co.* v. *U.S.*, 238 U.S. 393, 427 (1915), *U.S.* v. *Darby*, 312 U.S. 100, 115 (1941), see *Anderson* v. *Abbott*, 321 U.S. 349, 366, 367 (1944).

c. The decision below is in direct conflict with *Central Transportation Company* v. *Pullman's Palace Car Co.*, 139 U.S. 24, 45, 47-49 (1891) and with other decisions of this Court holding that a railroad franchise may not be transferred without legislative authorization; and with *Chesapeake & Ohio Ry. Co.* v. *Miller*, 114 U.S. 176, 183-186 (1885) and with other decisions of this Court holding that the statutory privilege of tax exemption on a railroad right of way cannot be transferred at a foreclosure sale.

According to the decision in *Northern Pacific Railway Co.* v. *Boyd*, 228 U.S. 482, 502 (1913) the foreclosure transfer herein was a voluntary transfer under a private agreement. The reorganization was nominal and respondent was not a bona fide purchaser for value. See Appendix C, infra, p. 33.

3. Equitable Considerations and Respondent's Inconsistent Positions. The decision below sanctions findings of disputed material fact in a summary judgment opinion and the assessment of costs against petitioners for the printing of a mass of misleading and nonevidentiary material designated for printing in the appeal record by the respondent. Petitioners contended that this printing was unnecessary, would expose petitioners to the risks of excessive costs and a misleading and excessively long appellate record (R. 51). The Court of Appeals, as noted above, denied the motion to exclude this material from printing without prejudice. We urge that this Court

should now exercise its corrective powers herein. Insistence upon procedural regularity, as stated by Mr. Justices Holmes and Brandeis, has been a large factor in the development of our liberty. The serious procedural and substantive irregularities in the present case outweigh, we believe, the predisposition which appellate courts must, in most all cases, have in favor of the propriety of a trial judge's action. (See dissenting opinion of Mr. Justice Frankfurter in *Sacher* v. *U.S.*, 343 U.S. 1, 32 (1952).

Unscrupulous loading of a record with nonevidentiary material and the amercing of the cost thereof against its victim should not be tolerated. Now is the time, to use the words of Mr. Justice Cardozo, when this Court should speak out and remind us of the rules of the game we are playing.

Entering into equitable consideration also is the fact that petitioners have been denied a day in court to test their rights under a federal statute upon the motion of respondent whose rights are based upon the same statute.

The decision of the court below ignores the rule that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).

4. Importance of the Case. The decision of the Court below did not afford the protection to petitioners' rights required by the due process clause. Petitioners are not seeking to relitigate issues already tried and decided. They are seeking opportunity to litigate the genuine issues of material fact and law raised by the pleadings and discarded from the summary judgment proceedings.

Respondent protested against the unfairness, because of the deaths of witnesses, of having to go to trial. However, it has been permitted to load the record with a mishmash of non-evidentiary material (from the reading of

which any appellate judge should properly shrink) practically all of which was hearsay, double hearsay and the words of persons long dead. Everything from ancient newspaper clippings to the proverbial kitchen sink was dumped into the record for identification by the respondent and has been used, despite petitioner's efforts, to enable it to escape being called to the bar of justice.

The decision of the court below denies petitioners a day in court to vindicate their rights under a federal statute. The requirement in Rule 56 that the moving party must be entitled to judgment as a matter of law has been ignored. The statute vests petitioners with a present property interest in the Federal corporation's assets.

Respondent, however, succeeded at the District Court level in excluding from this case: (a) the present effect of the federal statute, (b) whether the Federal corporation now owns valuable franchise and other assets, (c) whether respondent is lawfully entitled to enjoy the use of these assets without making provision for the minority stock, (d) whether respondent has conducted its affairs in deference to the ultimate property right of the minority and (e) whether it has misused the forms of legal procedure to hinder and prevent effective litigation against it.

The foregoing issues (R. 8, 9, 15, 39, 40, 54-58) were eliminated from the case by the District Court's refusal to consider items (d) and (e) and its acceptance of the contentions that the question of respondent's title to the federal railroad franchise was not involved in the summary judgment proceedings and that it was "not in order" for the court to consider the present effect of the federal statute (R. 40, 56). This exclusion of the effect of the statute and of fundamental matters set forth in the complaint carried with it also the exclusion of directly applicable Supreme Court cases holding that the defense of laches is not available to enable one to acquire, or to have the benefit of, title to property which he is pro-

hibited from acquiring by statute. Among the cases thus set at naught are: *Oregon & California R.R. Co.* v. *U.S.*, 238 U.S. 393, 427 (1915) and *Ewert* v. *Bluejacket*, 259 U.S. 129, 138 (1922).

In the Court of Appeals, and in this Court in its opposition to our first petition for certiorari, respondent asserted that the matters (a) to (d) in the second preceding paragraph above had been the subject matter of adversary contest and adjudication in the District Court. The present record contains undisputed matter establishing that this materially prejudicial assertion is contrary to fact (R. 38-40, 64, 65).

In the interest of justice, respondent should not be permitted to lead the District Court to find that it was unnecessary and not in order to consider and determine the franchise and other questions presented by the complaint, and then to contend in the appellate courts that these matters had been the subject of adversary litigation and determination in the courts below. See Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, 59 Harv. L. Rev. 1132 (1946).

According to reports in newspapers and financial journals, published since this case was last here, respondent is in process of merging with two other railroad corporations. In the pending merger the fact that Congress, as pleaded in the complaint herein, has four times refused to authorize respondent as the successor to the federal corporation and its franchises will be of importance. The statutory provisions against consolidation of the main line of federal railroad, noted above p. 19, will also be vital factors. The public policy underlying the requirement that the main line of federal railroad be owned and operated as a continuous line by the federal corporation, (*Roberts* v. *Northern Pacific Railway Company*, 158 U.S. 1, 19-21, 23, 24), will undoubtedly be the subject of concern to state and federal governments as well as to shippers and the public generally.

The nature and extent of the federal corporation's assets; whether the respondent has title to, or can lawfully dispose of same; whether respondent, as 97% stockholder, is entitled to execute agreements or releases on behalf of the federal corporation and to receive and keep the consideration which may be paid for the federal corporation's franchises—are matters all left hanging in abeyance by the decision of the court below. Adjudication of these issues raised by the pleadings herein is important not only to the petitioners but to all participants in any merger and to the proper administration of justice.

Granting relief to the petitioners from the operation of the undisputedly erroneous summary judgment will correct a manifest injustice and also serve the public interest in other important respects.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT W. LISHMAN,
Counsel for Petitioners.

January 1957.

APPENDIX A

CONSTITUTION, STATUTE AND RULES

U. S. CONSTITUTION, AMENDMENT V:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTE INVOLVED:

The Act of July 2, 1864, 13 Stat. 365, as amended, is printed at pp. 20 a et seq. in Appendix B to the Petition for writ of Certiorari in No. 299, 350 U.S. 844. Rule 56 of the Federal Rules of Civil Procedure is printed in the same Appendix at pp. 38a, 39a.

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 26. Depositions Pending Action

(a) When Depositions May Be Taken. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be

taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes. As amended Dec. 27, 1946, effective March 19, 1948.

(b) Scope of examination. Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. As amended Dec. 27, 1946, effective March 19, 1948.

(c) Examination and Cross-Examination. Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 43(b).

(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(e) Objections to Admissibility. Subject to the provisions of Rule 32(c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(f) Effect of Taking or Using Depositions. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction

in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

Rule 54. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

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(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Rule 60. Relief from Judgment or Order.

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court. As amended Dec. 27, 1946, effective March 19, 1948.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949.

APPENDIX B

OPINION AND JUDGMENT BELOW

Opinion in *George A. Landell, etc., et al.* v. *Northern Pacific Railway Company,* United States Circuit Court of Appeals for the District of Columbia Circuit, October 11, 1956. Before Prettyman, Bazelon, and Bastian, Circuit Judges.

• • • •

PER CURIAM: This case is here a second time. The District Court (Judge Tamm) originally held the action barred by *laches,* rendering a careful opinion upon the point.[1] Landell appealed, and this court affirmed.[2] Certiorari was sought but was denied.[3] The mandate of this court issued, and the District Court entered judgment upon it. In doing so it assessed costs. Landell appealed from that judgment, using as procedural justification the feature of costs. Once here, however, he bases the merits of the appeal upon alleged flaws in the findings and other premises upon which the original judgment was based. Those questions are no longer open. Of course a judgment in the posture of this one may be attacked for fraud in its procurement. While appellant clothes his attack in language appropriate to such an issue, no fact remotely suggesting any such infirmity in the present judgment appears here.

The order of the District Court upon the mandate of this court is

Affirmed.

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[1] 122 F.Supp. 253 (1954).

[2] 96 U.S. App. D.C. 24, 223 F.2d 316 (1955).

[3] 350 U.S. 844, 100 L.Ed. —, 76 S.Ct. 85 (1955).

Order in *George A. Landell, etc., et al.* v. *Northern Pacific Railway Company,* United States Circuit Court of Appeals for the District of Columbia, dated November 19, 1954. Before Stephens, Chief Judge, Bazelon and Danaher, Circuit Judges.

* * * *

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the order of the said District Court on the mandate of this Court, appealed from in this cause, be, and the same is hereby, affirmed.

It is FURTHER ORDERED by the Court that appellee herein recover from appellants its taxable costs on this appeal and have execution therefor.

Dated: October 11, 1956

Per Curiam.

ORDER

This case came on for consideration on appellants' motion to exclude from printing in the joint appendix certain material designated by appellee, and was argued by counsel. Counsel for appellee having orally stated he will print such material in a separate appendix to appellee's brief, it is

ORDERED by the Court that the aforesaid motion be, and it is hereby, denied, without prejudice to the right of counsel for appellant to file a motion to tax costs for printing unnecessary portions of the record after hearing and disposition of this appeal. See Blake v. Trainer, 79

U.S. App. D.C. 362, 148 F.2d 10, 12. Also see Belt v. Holton, 197 F. 2d 579, 90 U.S. App. D.C. 148.

Per Curiam.

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APPENDIX C

Excerpt from "Public Aids to Transportation", Section of Research, Federal Coordinator of Transportation, G.P.O. (1938) vol. 2, page 102.

"In some instances, changes in ownership have resulted from the consolidation of two or more railway companies, stock in new companies having been issued to the stockholders in the old companies in lieu of stock in the latter; in other instances, they have resulted from private sales of the properties; and frequently they have resulted from foreclosure sale. A brief discussion, necessarily couched in abstract terms, of what happens under these circumstances will be helpful.

Any change in ownership, other than a nominal one, involves a valuation of the assets of the acquired company in terms of future earning power and of the liabilities taken over in terms of obligations to be met. The aids which a corporation receives would be reflected in some manner in its balance sheet, whether or not they took tangible form,[44] but a new owner would take over the assets and liabilities of such corporation at a commercial valuation and in amounts which might be more or less than those at which they had previously been carried. An original stockholder of the aided corporation would continue after such change of ownership to benefit from

[44] That is, in the form of fixed assets or of their net effect on the corporate surplus or deficit.

the aid, but any person succeeding to the interest in such stock prior to the change of corporate ownership would be a purchaser for value and not a beneficiary of the aid given. As to the changes in ownership resulting from private and foreclosure sales, where the transactions were bona fide sales to new owners, the new owners would be purchasers for value and would not have benefited from the aids to the predecessor companies.

In instances, some of the lands covered by Federal or State grants to original companies have been patented to present companies. In such cases, where the ownership by the present company of the properties of the original company has resulted from a *bona fide* sale of such properties, the present company is a purchaser for value and is not a beneficiary of the aid included in the land grant to the original company, except where the value of such land has increased since the sale was made and such increase could not reasonably have been anticipated at the time of the sale.

However, it is a matter of common knowledge that the changes in ownership of railway properties resulting from private or foreclosure sales have often been changes in name only, the stockholders of the old company being the owners of the stock of the new company. The succession, through purchase at foreclosure sale, by the Northern Pacific *Railway* Co., a present company, in 1896 to the properties of the Northern Pacific *Railroad* Co., which was the beneficiary of a large Federal land grant, furnishes an example of a nominal change in ownership. In *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482, wherein the validity of this sale as to a nonassenting creditor was in issue, the Supreme Court said (pp., 502, 506):

'Corporations, insolvent or financially embarrassed, often find it necessary to scale their debts and readjust stock issues with an agreement to conduct the same business

with the same property under a reorganization. This may be done in pursuance of a private contract between bondholders and stockholders. And though the corporate property is thereby transferred to a new company, having the same shareholders, the transaction would be binding between the parties. But, of course, *such a transfer by stockholders from themselves to themselves cannot defeat the claim of a nonassenting creditor.* As against him the sale is void in equity, regardless of the motive with which it was made. * * * There is no difference in principle if the contract of reorganization, instead of being effectuated by private sale, is consummated by a master's deed under a consent decree. * * * As between the parties and the public generally, the sale was valid. *As against creditors, it was a mere form. Though the Northern Pacific Railroad was divested of the legal title, the old stockholders were still owners of the same railroad, encumbered by the same debts. The circumlocution did not better their title against Boyd as a nonassenting creditor. They had changed the name but not the relation.* The property in the hands of the former owners, under a new charter, was as much subject to any existing liability as that of a defendant who buys his own property at a tax sale.' [Italics supplied.] [45]

Where there has been no real change in ownership in the succession of present companies to the properties of companies which received public aids, the present companies are beneficiaries of the public aids to the same extent as were the original companies."

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[45] It may be noted that the bulk of the acreage received by predecessors of the Northern Pacific *Railway* Co. was received by the Northern Pacific *Railroad* Co.

No. 722

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,145

GEORGE A. LANDELL, Executor, *et al.*,
Petitioners-Appellants,

v.

NORTHERN PACIFIC RAILWAY COMPANY,
Respondent-Appellee.

ANSWER TO "PETITION FOR REHEARING BEFORE THE FULL COURT OR IN THE ALTERNATIVE FOR MODIFICATION OF OPINION"

The present petition represents the fourth attempt by appellants to obtain a reversal by this Court of a judgment of the District Court dismissing for laches a complaint which seeks to recover in respect of transactions occurring more than half a century before it was filed. We submit that the petition is utterly without merit and should be dismissed.

The previous proceedings may be thus briefly summarized:

In this litigation, not commenced until 1950, minority stockholders of the Northern Pacific Rail*road* Company sought in substance to annul a foreclosure and reorganiza-

tion pursuant to which all of the properties and franchises of the Railroad Company were acquired by the present appellee Northern Pacific Rail*way* Company. These acquisitions were completed during the period 1896-1899 under decrees of the former United States Circuit Court for the Eastern District of Wisconsin, pursuant to a reorganization plan open to all stockholders of the old Railroad and accepted by the overwhelming majority of them. The present appellants appear to represent the descendants of the small minority of the old Railroad stockholders who refused in 1896 to participate in the reorganization.

The respondent-appellee Northern Pacific Railway Company moved in the District Court under Rule 56 for summary judgment on the ground of (1) the statute of limitations and (2) laches. This motion was supported by:

> (a) The deposition of Robert W. Lishman, counsel for and one of the petitioners-appellants, taken at the instance of the Railway.
>
> (b) Exhibits (coming largely from petitioners' own files) introduced in connection with that deposition and establishing, *inter alia,* that petitioners or their predecessors had full knowledge or were on notice of the facts underlying their present claims for something like half a century before the present action was brought.
>
> (c) Affidavits setting forth the substantial changes which have taken place since 1896 with respect to the affairs and property of the respondent Rail*way* Company, and establishing the death of every participant in the transactions under attack.

District Judge Tamm, in an opinion dated June 23, 1954, and characterized by this Court as "careful and exhaustive", granted respondent Railway's motion and

dismissed the complaint on the ground of laches (122 F. Supp. 253). Petitioners appealed.

In a short *per curiam* opinion dated April 14, 1955, this Court (Circuit Judges Prettyman, Bazelon and Bastian) affirmed (96 U. S. App. D. C. 24, 223 F. 2d 316). Petitioners then filed under date of April 28, 1955, a "petition for rehearing before the full court, or in the alternative, for modification of opinion", in which they raised substantially the same grounds which they had unsuccessfully argued upon the appeal, and which they now seek to raise again. The petition, in so far as it sought a modification of the opinion, was denied by Circuit Judges Prettyman, Bazelon and Bastian by order dated May 11, 1955. The petition, in so far as it sought a rehearing before the full court, was denied by the full bench (except Chief Judge Stephens, who did not participate) by order dated May 11, 1955, and amended May 25, 1955.

Petitioners then sought certiorari, which was denied on October 10, 1955 (350 U. S. 844).

They then petitioned the Supreme Court for rehearing of that denial. In their petition for rehearing they repeated their previous arguments and added a parallel column tabulation of the alleged "erroneous statements in Judge Tamm's opinion", plus their own comments. The Supreme Court denied the petition for rehearing on November 21, 1955 (350 U. S. 905).

On November 23, 1955, following the final disposition of the case in the Supreme Court, there was entered on the docket of the District Court an order on the mandate of this Court affirming the judgment of the District Court dismissing the complaint, with costs.

Five days later, on November 28, 1955, petitioners attempted to start the litigation all over again in the District Court, by a motion purporting to be made under Rule

60(b)(6) to "set aside, vacate, modify or correct" the judgment of dismissal, coupling with this a motion to review the taxation of costs. In the papers which they submitted in the District Court they set forth the same parallel column tabulation of the alleged "erroneous statements in Judge Tamm's opinion" which they had unsuccessfully presented to the Supreme Court as noted above.

Their motion was denied by Judge Tamm from the bench on December 21, 1955, without opinion.

Petitioners then presented their second appeal to this Court, from Judge Tamm's order of December 21, 1955.

On October 11, 1956, this Court (Circuit Judges Prettyman, Bazelon and Bastian) thus disposed of the second appeal:

> "PER CURIAM: This case is here a second time. The District Court (Judge Tamm) originally held the action barred by *laches*, rendering a careful opinion upon the point.[1] Landell appealed, and this court affirmed.[2] Certiorari was sought but was denied.[3] The mandate of this court issued, and the District Court entered judgment upon it. In doing so it assessed costs. Landell appealed from that judgment, using as procedural justification the feature of costs. Once here, however, he bases the merits of the appeal upon alleged flaws in the findings and other premises upon which the original judgment was based. Those questions are no longer open. Of course a judgment in the posture of this one may be attacked for fraud in its procurement. While appellant clothes his attack in language appropriate to such an issue, no fact remotely suggesting any such infirmity in the present judgment appears here.

[1] 122 F. Supp. 253 (1954).
[2] 96 U. S. App. D. C. 24, 223 F. 2d 316 (1955).
[3] 350 U. S. 844, 100 L. Ed. 61, 76 S. Ct. 85 (1955).

> The order of the District Court upon the mandate of this court is
>
> *Affirmed.*"

The present petition followed.

Argument

Nothing new or worthy of note is to be found in the present petition. All of the arguments which it contains have been dealt with in one or more of our previous briefs. All of them have been fully considered and rejected by all the courts which have passed upon all the previous applications. Indeed, practically all of those arguments, as shown by the record on the first appeal, are mere repetitions of claims which the petitioners or their predecessors have been unsuccessfully pressing upon Congress, the Executive Departments and the Courts at sporadic intervals over the last sixty years. We submit that the time has now come to call a halt.

On December 22, 1955, in connection with their second appeal, petitioners filed a motion to recall and stay the mandate, which was denied *per curiam* by this Court under date of January 6, 1956. In our answer and objections to this motion, under date of December 28, 1955, we said:

> "Defendant-appellee further respectfully gives notice, pursuant to Rule 23 of the General Rules of this Court, that the appeal now taken by plaintiffs-appellants from Judge Tamm's order of December 21, 1955, appears to have been sued out merely for delay, and that if said appeal is not dismissed before argument defendant-appellee will claim the additional damages and double costs contemplated by said Rule."

The groundless second appeal which this Court summarily rejected on October 11, 1956, followed by the present equally groundless petition, have imposed needless burdens upon this Court, and added expenses upon the respondent-appellee. In accordance with Rule 23, and pursuant to our notice previously given, we accordingly respectfully submit (1) that the present petition should be denied and (2) that double costs should be imposed upon petitioners-appellants.

Dated: October 30, 1956.

Respectfully submitted,

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FILED
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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 722.

GEORGE A. LANDELL, *et al.*,
Petitioners,

v.

NORTHERN PACIFIC RAILWAY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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February 11, 1957.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 722.

GEORGE A. LANDELL, *et al.*,

Petitioners,

v.

NORTHERN PACIFIC RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Question Presented.

The sole question here is how long petitioners should be permitted to burden the courts with a relitigation of a sixty-year old claim which has already been twice presented and rejected on the ground of laches in the District Court, in the Court of Appeals and in the Supreme Court of the United States. Respondent submits that the present petition is utterly without merit and should be denied.

Statement.

This is an attempt, by way of a second appeal and a second petition for certiorari, to relitigate matters which

have already been fully considered and decided against petitioners in all courts.

Respondent's position is fully set forth in our brief in opposition to the former petition for certiorari (No. 299, October Term 1955, petition denied October 10, 1955, 350 U. S. 844, rehearing denied November 21, 1955, 350 U. S. 905). We refer to that brief for a full statement of the facts and supporting record citations, which may be shortly summarized as follows:

The Northern Pacific Rail*road* Company was incorporated by Act of Congress of July 2, 1864 (13 Stat. 365). After extricating itself with some difficulty from insolvency following the panic of 1873 the Rail*road* again fell into financial difficulties in the panic of 1893 and defaulted on some of its bond issues. A receivership followed.

In 1896 a reorganization took place, pursuant to a plan of reorganization and foreclosure decree in the United States Circuit Court for the Eastern District of Wisconsin. That plan included a provision—open to all stockholders—for the exchange, share for share, of old Rail*road* stock for new Rail*way* stock upon payment of $10 for each share of preferred and $15 for each share of common. Substantially all the bondholders, and over 95% of the stockholders, joined in the reorganization plan. The present petitioners appear to represent the descendants of the small minority of old Railroad stockholders who refused to participate in the 1896 reorganization.

Under that reorganization and foreclosure, the assets of the old Railroad were acquired by the present respondent Northern Pacific Rail*way* Company, the major portion of the assets being acquired under the main foreclosure decree of 1896 and the balance under a supplemental decree of 1899.

In 1897 President Cleveland's Attorney General rendered a formal opinion to the Secretary of the Interior

holding that the new Rail*way* Company was the successor to the old Rail*road* and should be treated as such in respect of applications for patents under the original land grant by Congress (21 O. A. G. 486).

In 1898, following protests made as early as 1896, the predecessors of the present petitioners formed a Stockholders Protective Committee.

In 1900 a representative stockholders' suit was begun in the United States Circuit Court for the Southern District of New York by one Joseph Hoover, attacking the 1896 foreclosure and reorganization upon substantially the same grounds as are involved in the present case. Hoover had been active in the protests made by representatives of the Stockholders Committee. His counsel were the same individuals who were the counsel for the Committee, and looked to the Committee for instructions and guidance.

After some sporadic activity at the start, the *Hoover* case was allowed to lapse into oblivion. In 1906, 1909 and 1914 petitioners' counsel were unequivocally warned that the defense of laches would be interposed. Despite these warnings they did nothing and in 1938 the *Hoover* case was dismissed for failure to prosecute. A motion to restore it to the calendar, made by the predecessor of the present counsel for petitioners, was denied in 1939 for "inexcusable laches".

During the early part of the present century, the present petitioner Committee engaged in a campaign before Congress and elsewhere attacking the 1896 foreclosure and reorganization. Their efforts were uniformly unsuccessful. In 1904 they attempted to have the Attorney General overrule his predecessor's 1897 opinion. In that connection the predecessor of their present counsel submitted to the Attorney General briefs which made substantially the same arguments as appear in the present petition. The result

was another formal opinion of the Attorney General (25 O. A. G. 401), affirming the action of his predecessor and holding that the Rail*way* was the successor of the Rail*road*.

In the 1930's representatives of the petitioner Committee attempted to intervene in the *Land Grant* case between the United States and the Rail*way*. These attempts were likewise unsuccessful (102 F. 2d 589, 595-6). They were equally unsuccessful in their attempts to appear in this Court when the *Land Grant* case was argued here (309 U. S. 626, 311 U. S. 613). Thereafter for about a decade the Committee appeared to be semi-moribund; and for over 30 years it has sent no circulars of advice to the minority shareholders whom it claims to represent.

In 1950 petitioners brought the present action in the United States District Court for the District of Columbia. The substance of their complaint is the same as that which they and their predecessors had been unsuccessfully making off and on for the previous half century. They allege that the 1896 reorganization and foreclosure were illegal and void, and that six of the mortgages placed upon the old Railroad's property between 1879 and 1889 and aggregating more than $100,000,000 were likewise illegal and void.

Defendant-respondent Railway answered the complaint and proceeded to take the deposition of the principal plaintiff-petitioner, Mr. Robert W. Lishman, who is also counsel for plaintiffs-petitioners. In connection with Mr. Lishman's deposition there were marked as exhibits a number of documents—bearing on the issue of laches—coming chiefly from the petitioners' own files. On the basis of that deposition and those documents (plus three affidavits establishing the death of all those concerned in the 1896 transactions and the subsequent changes which have occurred in the Railway's position and properties), the Railway moved for

summary judgment under Rule 56 on the grounds of (1) statute of limitations and (2) laches.

On June 23, 1954, the District Court (Judge Tamm), in an opinion characterized by the Court of Appeals as "careful and exhaustive", dismissed the complaint for laches and found it unnecessary to pass upon the question of limitations (122 F. Supp. 253).

Petitioners appealed. On April 14, 1955 the Court of Appeals for the District of Columbia Circuit unanimously affirmed *per curiam* (96 U. S. App. D. C. 24, 223 F. 2d 316).

Petitioners then filed a "petition for rehearing before the full court, or in the alternative for modification of opinion". This was denied without opinion on May 11, 1955.

They then petitioned for certiorari, which was denied on October 10, 1955 (350 U. S. 844).

They then petitioned for rehearing of that denial. That petition was denied on November 21, 1955 (350 U. S. 905).

On November 23, 1955, following the final disposition of the case here, there was entered on the docket of the District Court an order on the mandate of the Court of Appeals affirming the judgment of the District Court with costs.

Five days later, on November 28, 1955, petitioners started all over again in the District Court with an attempt to persuade that Court that its own prior decision, the affirmance of that decision by the Court of Appeals and the denial of certiorari by this Court were all wrong. They did this by a motion purporting to be made under Rule 60(d)(6) to "set aside, vacate, modify or correct" the summary judgment dismissing the complaint for laches.

This motion was argued in the District Court on December 21, 1955, and was denied from the bench without opinion.

Petitioners then appealed for a second time to the Court of Appeals. On October 11, 1956, that Court disposed of the second appeal with a *per curiam* affirmance (App. B to petition, p. 31).

Following the same line as on their former appeal, petitioners then asked the Court of Appeals "for rehearing before the full Court or in the alternative for modification of opinion." This application was denied *per curiam* without opinion on November 2, 1956. The present petition for certiorari then followed.

Argument.

In our brief in opposition to the former petition for certiorari, after setting out in more detail the facts summarized above (minus, of course, the subsequent proceedings on the second appeal) we said

> "What the facts set out above demonstrate—and what petitioners indeed now admit—is simply this: they or their predecessors have known all about their present claims for at least half a century but have deliberately refused to bring suit until every participant and witness had died and the position of the respondent had changed beyond recognition. This situation, entirely of petitioners' own making and scarcely a reason why the docket of this or any other court should now be burdened with their claims, is entirely unique. To our knowledge there is no other reported case involving laches in which the facts were so extreme or in which the decision seems less likely to serve as a precedent."

That statement is as true now as it was then. All of the arguments now advanced by petitioners were presented and fully considered by the courts on the first appeal and first petition for certiorari. Most of them, including par-

ticularly the "public interest" claim, are the same as the arguments which were rejected by President Cleveland's Attorney General in 1897, by President Theodore Roosevelt's Attorney General in 1905, by Congress in 1908 (App. 477-87 of record in No. 219, Oct. Term 1955) and by the courts which denied the attempted interventions in the *Land Grant* case in the period 1938-40.

We submit that no conceivable basis has been shown for the granting of certiorari or for the interminable protraction of this litigation by successive appeals. The present petition is in substance nothing more than a second petition for rehearing of the former application, contrary to the spirit, if not the letter, of Rule 58(4) of the Rules of this Court.

Conclusion.

The petition should be denied.

Dated: February 11, 1957.

Respectfully submitted,

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MOTION FILED MAY 29 1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 722

GEORGE A. LANDELL, Executor, et al., *Petitioners,*

v.

NORTHERN PACIFIC RAILWAY COMPANY, *Respondent.*

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(A) Motion for Leave to File Petition for Rehearing

Petitioners respectfully move for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, filed February 25, 1957 (352 U.S. 1017). Rehearing is sought at this time, because as is pointed out more fully in the annexed petition, the Court, in *United States* v. *Union Pacific Railroad Company,* filed April 8, 1957 (353 U.S. 112), made a new decision which should control the present case. Although this petition for rehearing is filed after the expiration of the time prescribed in Rule 58, the grounds upon which it is based arose after such time; and the Court clearly has power, in its discretion, to entertain the petition. *Roberts Sash & Door Co.* v. *United States,* 282 U.S. 829; *Duquesne Steel Foundry Co.* v. *Burnet,* 282 U.S. 830; *Douglas* v. *Willcuts,* 295 U.S. 722; *United States* v. *Ohio Power Co.,* filed April 1, 1957, 353 U.S. 98.

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ROBERT W. LISHMAN,
Counsel for Petitioners

Dated: May, 1957

(B) Petition for Rehearing of Order Denying Petition for Writ of Certiorari

Reasons for Granting Rehearing and Issuing the Writ

1. *United States* v. *Union Pacific Railroad Company,* decided by this Court on April 8, 1957, is a new case which decides identical or similar issues contrary to the decision in the present case. The subject of the litigation in the *Union Pacific* case was the nature of the title to, and the parties' interest in, certain portions of the right-of-way. The decision in the present case denies petitioners the opportunity of a day in court to litigate the same or similar issues.

a. If there is to be uniformity of decision and of application of the principles announced in the *Union Pacific* case, the order of February 25, 1957, denying the petition for writ of certiorari in this case cannot stand. See *United States* v. *Ohio Power Company,* 353 U.S. 98, where this Court granted petition for rehearing, vacated the order denying certiorari, granted the petition for certiorari and reversed the judgment below. In doing this, the Court stated that "the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules."

b. The pertinent issues decided, and principles applied, in the *Union Pacific* case are as follows:

(1) The title to, and the nature of the parties' interest in, the 1862 right-of-way grant are now susceptible of judicial construction.

(2) The interest of the grantee in the right-of-way is subject to the restrictions in the grant. The grantee does not have a fee simple interest in the right-of-way lands. The grantor has a superior interest in the minerals thereunder and can enforce the obligations in the grant and the restrictions imposed upon the right-of-way.

(3) The obligations and the right-of-way restrictions in the grant are of a current and continuing nature.

(4) The Union Pacific Railroad Company, a Utah corporation (which succeeded to the original federal corporation grantee by means of an 1880 reorganization) is subject to and bound by the obligations and restrictions contained in the grant of 1862. The reorganization did not serve to give it any greater interest in the right-of-way lands than that of its predecessor nor to relieve it from the obligations imposed upon its predecessor.

c. In the present case the decision and principles applied are flatly contrary to those announced and applied in the *Union Pacific* case. The identical or similar issues in the present case which were decided contrary to the decision and principles announced in the *Union Pacific* case, are as follows:

(1) The present case decides that the title to, and the nature of the parties' interest in, the right-of-way lands granted by the Act of July 2, 1864, 13 Stat. 365, are not now susceptible of judicial construction. The present decision, despite the fact that the federal statute places no time limit upon the rights inherent in the stock certificates of the federal corporation, determines that passage of time without institution of suit, precludes resort to judicial intervention to ascertain the nature of the majority stockholder's statutory interest in the right-of-way and of the minority stockholders' statutory interests therein.

(2) The present case decides that the grantee's interest in the right-of-way is not subject to the restriction in the grant.[1] In this connection, it should be noted that the

[1] The statute provides current and continuing property rights for the petitioners in the right-of-way. The grant contains nonassignable covenants and restrictions to preserve their interests. Congress has on three occasions refused to consent to the assignment of the federal corporation to respondent free from the force of these obligations. Petitioners contend that the courts have no jurisdiction to make the present decision, which modifies and repeals essential provisions in a statute, despite the refusals of Congress to do so.

Northern Pacific grant contains specific prohibitions not present in the Union Pacific grant.

Section 10 of the Northern Pacific grant provides that:

> " . . . no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the congress of the United States."

Section 3 of the grant forbids the grantee to consolidate the road with any other railroad except under specified conditions by which the federal corporation would always be the assignee and never the assignor. This Court has affirmed a Circuit Court of Appeals opinion stating that this restriction was to:

> " . . . mark one of the primary objects and insure the accomplishment of one of the great purposes, of the charter, namely, that a single corporation, the corporation created by that charter, should, in the end, own and operate a continuous railroad from Lake Superior to Puget Sound, . . ." (*United States* v. *Northern Pacific Railroad Company,* 8 Cir., 1899, 95 Fed. 864, 876, affirmed 177 U.S. 435).

The obligations and restrictions in the *Northern Pacific* grant run to the grantor and to the original stockholders and their successors. The United States' interest in the obligations and restrictions is to preserve the continuity of the main line of federal railroad in an operating corporation subject to the direct and reserved power of Congress. The Act and its legislative history shows that the United States was also interested in having the federal railroad corporation financed by the people of the United States as stockholders and by the grant of lands to aid construction. The stockholders' interest is that the same statutory prohibitions concurrently protect their property rights.

The decision in the *Union Pacific* case holds that a right-of-way restriction may be enforced by one of the

parties to the grant. The decision in the present case holds that petitioners, who are parties to a similar grant, may not enforce a similar restriction.

(3) The present case holds that the grantee's obligations and the prohibitions limiting the grantee's title in and use of the right-of-way are not of a continuing nature and do not run with the land. The present case treats the obligations and prohibitions as having only a temporary force which was spent in 1896 or shortly thereafter. By applying the doctrine of laches the District Court has exercised a revisory legislative power.

(4) The present case holds that respondent, the Northern Pacific Railway Company, the alleged successor to the original grantee, is not bound by the obligations and prohibitions contained in the grant. The reorganization in the present case, unlike that in the *Union Pacific,* is held to give respondent the right-of-way lands free from the prohibition against mortgaging without the consent of Congress.

In the present case the existing federal corporation grantee, for itself, its successors and assigns, in accordance with section 12 of the Act of July 2, 1864, duly accepted in writing "the terms, conditions and impositions" of the grant. The rationale of the present decision is that such acceptance was meant to bind the original grantee alone; that by means of a consent decree conveyance the 97% stockholder of the federal corporation has acquired the right-of-way free from the prohibitions in the grant. This constitutes judicial legislation.

Respondent in its answer in the present case, after alleging that it was the successor of the federal corporation by virtue of the consent foreclosure decree of April 27, 1896, alleges that it is not bound by the prohibition against mortgaging imposed upon the right-of-way. Respondent in paragraph LX of its answer alleges that the

laws of Wisconsin enable it to do what the federal grant prohibits. This makes a state statute paramount to the plain command in a federal statute.

The theory followed in the present decision, that respondent as a "successor and assign" of the original grantee is not bound by the prohibition against mortgaging the right-of-way, is shown in paragraph LI of the answer. Respondent there alleges (Record p. 104, 1st petition for certiorari):

> " . . . that by said Act of July 2, 1864, the right-of-way and lands therein mentioned were in terms granted to 'said "Northern Pacific Railroad Company", *its successors and assigns'*, and that the provisions of said act restricting the power of the corporation created thereby to issue bonds or to create liens on its property were not made applicable to or intended to govern any successor to the properties of said company, or any assignee thereof."

In *Oregon Ry. and Navigation Co.* v. *Oregonian Ry. Co., Ltd.*, 130 U. S. 1, 30-33, this Court determined that the presence of the words "successors and assigns" do not authorize an assignment whereby the assignee escapes the continuing obligations contained in a railroad charter and grant. The present decision nullifies the nonassignability safeguard which Congress expressly provided for the original stockholders and their successors.

In the *Union Pacific* case, the grantee's successor was held bound by the restrictions in the grant. The present case decides that whether the restrictions contained in the Northern Pacific right-of-way grant are binding upon the successor is a question which cannot be litigated by the petitioners.

2. The Court, if it determines that the present case should be controlled by the decision and principles announced in the *Union Pacific* case, or that it should be reversed in the interests of justice, would not be confronted

with the policy that litigation must at some time become final.

a. According to the *Union Pacific* case the present decision that the restrictions upon the Northern Pacific right-of-way are not enforceable would not apply to an action by the United States. According to *Ashwander et al.*, v. *T.V.A.*, 297 U. S. 288, 319-322, the petitioners, as stockholders, could maintain a bill in equity to protect the interests of the federal corporation against what is asserted to be a present, illegal use of its property. The dismissal for laches of the suit against respondent as 97% stockholder, should not bar the minority from maintaining a bill against the federal corporation, its officers and directors to discover assets. Stockholders in an existing corporation, under any theory of law, are entitled to ascertain if their company has assets, the source of the funds which keep it alive as a going concern, the purpose underlying its continued existence, its receipts and expenditures and the nature of its activities.

b. There has been no hearing, trial or decision on the merits. There has been no change in the fact that petitioners and respondents are each stockholders in the federal corporation. Meetings of the federal corporation's stockholders have been held since the decision herein. The terms of the federal charter and grant remain unchanged.

c. As stockholders, petitioners have the right to ascertain whether the assets of the corporation are being used by another without payment therefor to the corporation. Section 13 of the Act of July 2, 1864 requires the directors to make annual reports of their proceedings and expenditures verified by the president and at least six of the directors. Petitioners also have the right to compel their corporation, its officers and directors to assert its property interest in the matter. In such a suit respondent could not successfully claim, as it has in the present case, that

Wisconsin law gives it the authority to make free use of the federal corporation's charter, franchises and right-of-way. See *Taylor* v. *Standard Gas & Electric Co.*, 306 U.S. 307, 322, where the broad equitable principle is applied, that the doctrine of corporate entity will not be regarded when to do so would work injustice, and permit a parent corporation to manipulate the assets of a subsidiary in disregard of the rights of other stockholders in the subsidiary.

d. Since the right-of-way lands were not, under any act of Congress, capable of being conveyed from the federal corporation to the respondent, its 97% stockholder, the validity of the conveyance is always open to an action at law by stockholders of the federal corporation whose proprietary interest in the right-of-way is derived from the same statute as that from which respondent must derive its interest. See *Burfenning* v. *Railway Co.*, 163 U. S. 321; also *Doherty* v. *Northern Pacific Railway Company*, 177 U.S. 421, 428, where this Court stated that Northern Pacific Railway Company, the respondent herein, claimed its right-of-way title interest was founded directly upon the Act of July 2, 1864. The Court said, "It is not claimed that this right of way was acquired by purchase or condemnation, but it is claimed by virtue of the terms of the Act of Congress, approved July 2, 1864, incorporating the Northern Pacific Railroad Company, and granting to it, among other rights and privileges, a right of way through the public lands of the United States." The prayer in the complaint in the present case, which was ignored in the summary judgment decision, was to have the court adjudge, as the Court did in the *Union Pacific* case, that respondent's interest in the right-of-way was limited to the interest provided in the underlying Act of Congress and that both respondent and petitioners had pro rata property interests therein.

e. No court or administrative agency has constitutional power to interfere with the exercise of the plenary

power of Congress in its appropriation of public lands to a particular grantee. If petitioners establish that legal title to the right-of-way lands is in the federal corporation, they are entitled, under many decisions of this Court, to hold the respondent as trustee of the title for the benefit of the federal corporation to whom Congress appropriated the lands.

f. The essential elements alleged in the complaint, which the present decision obliterates with an irrelevant discussion of fraud and the laches applicable thereto, is that the charter, franchises and right-of-way cannot be acquired or enjoyed by respondent because they are non-assignable without the consent of both Congress and the minority stockholders (Complaint, paragraphs VII, LI, LII, LIV, Record, first petition for writ of certiorari, pp. 6, 33, 35). See *Central Transportation Co.* v. *Pullman's Palace Car Co.,* 139 U. S. 24, 41, 44, 48, 49, 59, which holds that a railroad charter, franchise, and right-of-way cannot be transferred without both such consents. The 1896 reorganization was a procedure whereby respondent acquired the federal corporation's assets of the agreed value of $345,000,000 (more than enough to satisfy all liabilities and reach the petitioners) without obtaining the consent of either the United States or the minority stockholders to the transfer of the non-assignable assets. Norris Darrell, Esquire, in *The Use of Reorganization Techniques in Corporate Acquisitions,* 70 Harv. L. Rev. 1183, 1197, 1199 (May 1957), points out that, in the asset acquisition technique of corporate reorganization, the law requires the obtaining of consent to the assignment of non-assignable, burdensome contracts and franchises of the acquired corporation.

The District Court's first decision in this case, by another judge, was founded upon the principle that, respondent as 97% stockholder could not lift itself by its own bootstraps into the position of owner of the charter,

right-of-way and franchise of the federal corporation (98 F. Supp. 479, 480-482). The first decision, which should have been the law of this case, recognized that non-assignable assets were incapable of transfer without the obtaining of the necessary consents.

The fact that the complaint alleges respondent has fraudulently hindered the institution of effective litigation against it, has been erroneously treated by the summary judgment as being allegations of a cause of action founded upon fraud. The haste of the summary judgment technique has smothered the true cause of action—that respondent is now unlawfully enjoying non-assignable assets—and left in its wake confusion and injustice. See, *infra*, p. 18.

3. The decision and principles announced in the *Union Pacific* case are contrary to and inconsistent with the present decision that respondent is entitled to a summary judgment dismissing the complaint for alleged laches.

a. Implicit in the *Union Pacific* case is cognizance of the law that a reorganization conveyance cannot nullify the present force of statutory obligations, nor give a better title to the purchaser than that of the mortgagor.

The decision in the present case to the contrary is remarkable. The basic title questions present in the complaint were side-tracked and a decision made on the theory that the issue was whether plaintiffs were barred by laches from obtaining relief for an ancient fraud. This theory is contrary to the pleadings. In the present case it was alleged in the complaint that Congress on three occasions refused to authorize transfer of the right-of-way or to terminate, or to vary the restrictions imposed upon the right-of-way and refused to give respondent authority to mortgage it. The complaint asserted the incompetency of the federal corporation to transfer its charter, right-of-way and franchises to respondent and the incompetency of the respondent to receive them in the

absence of Congressional authorization. This theory was not one of fraud.

During the 1896 reorganization of the federal corporation, respondent caused three bills to be introduced authorizing respondent to become the lawful successor at the pending foreclosure sale to the charter powers, franchise, right-of-way and other statutory assets of the federal corporation. Each bill also authorized respondent to place a mortgage upon the right-of-way and franchise. These bills were S. Res. 124, H. R. 168 and H. R. 190, all in the 54th Congress, 1st Session. None of these bills passed. In the Union Pacific reorganization Congress passed legislation enabling the Utah Railroad Company to become successor to the federal corporation.

Respondent's witnesses testified before the House Judiciary Committee with respect to H. R. 168, that without enabling legislation, respondent, a Wisconsin corporation, could not lawfully acquire title to the charter, right-of-way or franchise of the federal corporation at the then pending foreclosure sale (Record p. 184, first petition for certiorari).

Despite failure to obtain the enabling act, respondent went ahead and purported to acquire the charter, right-of-way and franchise at the consent sale.

The consent foreclosure decree of April 27, 1896, however, in paragraph XXIV reserves and leaves undetermined the issue duly raised by an intervener, whether the mortgage then being foreclosed against the right-of-way and railroad franchise was a nullity because it had not been authorized by Congress as required by section 10 of the Act of July 2, 1864. Conveyances of the right-of-way and franchise to respondent pursuant to the decree keep this reservation open and undetermined (Record pp. 21, first petition for certiorari). This, of course, prevents any successful claim of title by reason of open and notorious adverse possession, as of right, to the railroad charter, franchise and right-of-way.

At no time has Congress authorized respondent to succeed to the federal corporation or to have title to the railroad franchise or right-of-way. Thus in 1898 Congress by law refused to recognize the validity of the 1896 foreclosure (Act of July 1, 1898, 30 Stat. 597, 620).

By section 4 of the Act of June 26, 1929, c. 41, 46 Stat. 41, Congress provided that the act "shall not be construed as affecting the present title of the Northern Pacific Railroad Company, or its successors, . . ." Respondent was afforded a limited protection "in the right of way of said road or lands actually used in good faith . . . in the operation of said road."

At the time respondent, 97% stockholder of the federal corporation, caused its assets to be transferred to respondent in exchange for respondent's paper securities, the petitioners were also stockholders of the federal corporation. No provision was made for the minority shareholders, who were not parties to the proceedings, although the assets were ample to reach them.

Respondent stated that the old federal corporation is a shell [2] and is kept alive because the federal statutes do not provide a way to wind up a federal corporation. This theory overlooks the fact that respondent itself has successfully opposed petitioners' attempts to secure a legislative dissolution of the federal corporation. The

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[2] Respondent's counsel told the District Court that: "Since 1896 the Northern Pacific Railway Company has held just over 97% of the stock of the old Railroad. The old Railroad has had literally no property whatever since the period 1896 to 1899. It exists as a shell. It has nothing but a board of directors which meets annually. Why is it still around? Well, the reason which has been publicly stated before is that there is apparently no way set up in the Federal statutes to wind up a corporation created by a Special Act of Congress, except perhaps by getting another Act of Congress . . ." (Official Transcript, pp. 21, 22, Hearing on Motion for Summary Judgment, May 11, 1954, *Landell et al.* v. *Northern Pacific Railway Co.*, 122 F. Supp. 253).

decision in the present case that laches may be used to fill an alleged lacuna in the statute books and as a substitute for the repeal or modification of a statute is a wholly novel and unconstitutional concept. The decision in the *Union Pacific* case that the provisions in a statute survive a corporate reorganization, should govern the present case. Enforcement of the statute will place the statutory assets of charter powers, franchise and right-of-way in the hands of the federal corporation, where by law they belong, or will otherwise afford protection to petitioners' current and existing fundamental rights.

b. Reappraisal of the present case in the light of the *Union Pacific* case demonstrates that the laches determination is without merit in law or in fact.

(1) The doctrine of laches is not applicable. According to the *Union Pacific* case, the right-of-way restrictions are continuously obligatory and the respondent can be compelled henceforth to observe them. In this respect the *Union Pacific* decision indicates that the present case is analagous to the cases holding that laches is not available as a bar to prosecute a defendant whose interest is founded upon violation of an outstanding statutory obligation, *Oregon & California Railroad Co.* v. *United States,* 238 U. S. 393, 427; and is not available as a bar to prevent the beneficiary of a statutory prohibition obtaining relief from a violation of the prohibition, *Ewert* v. *Bluejacket,* 259 U.S. 129, 138; and, since in the present case the defense of acquiescence was expressly disclaimed, laches is not available as a bar to prevent the owner to enjoin further infringement of an outstanding patent, *Menendez* v. *Holt,* 128 U.S. 514, 524, 525. In the present case the term of the outstanding grant is perpetual and the petitioners have a continuous pro rata property interest therein. Congress itself could not constitutionally erase their interest except for a public purpose and upon payment of just compensation. The refusals of Congress

to consent to the assignment of the federal corporation, to repeal the Act and to dissolve the federal corporation, preserves petitioners' rights in the federal grant and charter. It is beyond a court's jurisdiction to hold otherwise, whether directly, or indirectly by the self-imposed, discretionary rule of laches.

(2) The present case lacks the most essential ingredient of laches, namely, prejudice to respondent as a result of petitioners' delay in suing. *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 488, 489.

Under the *Union Pacific* case the obligations, prohibitions and restrictions in the grant are enforceable at any time by the United States.

The alleged inaction of the petitioners has not and could not prejudice respondent's right, title and interest in the grant. Should the United States sue, laches would not prevent achievement of the same or even greater relief than that sought by the petitioners in the present case.

Respondent by its own actions has demonstrated its constant awareness of its title vulnerability. It has always known that at any time it may be compelled by the United States to retransfer the federally-granted main line of road back to the federal corporation and to obey the statutory prohibitions. It has always conducted its affairs and that of its subsidiary federal corporation on the basis that sometime there is bound to be a day of reckoning.

Respondent keeps the stocks, bonds and other securities of the federal corporation alive and uses them to preserve that corporation as an avenue of escape. Even since the entry of the summary judgment, it causes meetings of the federal corporation's stockholders to be held. Notices of these meetings are given to the petitioners by respondent's Secretary, who is also Secretary-Treasurer of the

federal corporation. If the federal corporation has no assets, who pays for these meetings and for what purpose? Why does Congress in statutes dealing with the Northern Pacific grant treat the federal corporation as owner and require title documents to be executed by it?

In the several mortgages placed by the respondent upon the right-of-way under the alleged authority of Wisconsin law, and without obtaining the consent of Congress, as required in section 10 of the grant, unique escape clauses are provided. Respondent reserves the discretionary right to retransfer the purportedly mortgaged right-of-way to a railroad corporation organized and existing under the laws of the United States. This right may be exercised without obtaining the consent of the mortgage trustee. The only corporation capable of being such transferee is the federal corporation.

Petitioners' failure to sue has never lulled respondent into a state of prejudice. It knows that the provisions in a statutory grant are obligatory until repealed and it has governed itself accordingly with respect to both the United States and the petitioners. One of its vice presidents testified before a Congressional Committee in 1926 that it "always" conducted itself in deference to the rights of the minority stockholders of the federal corporation.

(3) As respects the minority stockholders, the federal corporation is an empty "shell." As respects the federal Government, it is a living entity. Respondent's reason in the present case why the "old Railroad" is "still around" (supra, p. 12) is feigned. Its director and counsel in their testimony before the House Committee on the Judiciary stated the true reason, *supra*, p. 11. It is that neither the State of Wisconsin nor a court can divest the charter powers, franchise and right-of-way from the federal corporation and invest respondent with them, free from the restrictions, in the absence of enabling federal legislation. The complaint is founded upon this principle of

constitutional law. Its prayer for relief does not mention fraud. Its prayer, like that in the *Union Pacific* case, is for a judicial construction of the grant to ascertain the nature of the petitioners' and respondent's interests in the federally granted charter, franchise and right-of-way.

(4) If the case were based upon an ancient fraud, as the summary judgment opinion mistakenly asserts, it would be barred, not by laches, but by the statute of limitations. It is extremely remarkable that this fact, pointed out to the District Court on numerous occasions, is not mentioned in the decision. The failure of the decision to separate the salient fundamentals in the complaint from what is historical, may be due, in part, to the prolixity of the pleading.

The misconception of the cause of action stated in the complaint, is further evidenced by what occurred at the argument before the Court of Appeals on the first appeal and the statement concerning failure of proof of fraud in the second, short, per curiam opinion of that court.

At the argument, the presiding judge stated that petitioners' counsel should concentrate on meeting the heavy burden of establishing respondent's fraud and cease from arguing that the cause of action centered about the nature of the title interest of the petitioners' and respondent in the charter, franchises and right-of-way of the federal corporation and that these were not assignable without the consent of Congress and of the stockholders.

The per curiam opinion in the second appeal, 238 F. 2d 30, states that the merits of the appeal are based upon alleged flaws in the findings of fraud upon which the original summary judgment was based; that those questions are no longer open; that a judgment in the posture of this one may be attacked for fraud in its procurement and that no fact remotely suggesting any such infirmity in the present judgment appears here.

We suggest with all due respect, that these occurrences indicate a too hasty reliance upon the incorrect interpretation of the complaint by the District Court. This Court's decision in the *Union Pacific* case demonstrates that petitioners do not have the heavy burden of establishing the elements of fraud committed long ago and far away. They are entitled to prove the present nature of the petitioners' and respondent's interests under an operative statute in the right-of-way, and that the respondent is bound by the obligations in the grant.

4. Importance of the case. Mr. Justice Greenberg of the Supreme Court of the State of New York has pointed out that, worse than delay in the administration of justice is the summary method of disposing of business, where the court subordinates keeping up with justice, to keeping up with its calendar. "Haste is a prolific parent of error and injustice." (*Myth and Reality About the Courts, Judges and Justice,* 12 The Record of the Association of the Bar of the City of New York, May 1957, pp. 246, 252). Judge Learned Hand has adverted to this same danger. *Bozant* v. *Bank of New York,* 2 Cir., 1946, 156 F. 2d 787, 790. See *Arnstein* v. *Porter,* 2 Cir., 1946, 154 F. 2d 464, 471, 474.

Respondent is today violating the restriction in the grant, thereby depriving petitioners of their fundamental rights as stockholders in an existing corporation. This is not just an old wrong, it is a current and continuing wrong. Upon the record in this case there was no jurisdiction in the courts to interfere with and nullify the plain commands of an operative statute. The courts had no legal power to erase the minority interest. If a summary method was to be used in disposing of this case, respondent's motion for dismissal should have been rejected by the court *sua sponte* on the ground of lack of jurisdiction. Non-use or non-enforcement of a statute does not result in its modification or repeal and a court

has no authority to determine otherwise. "The repeal of laws is as much a legislative function as their enactment.[10]" *District of Columbia* v. *Thompson Co.*, 346 U.S. 100, 114.

According to the present decision, the federal corporation's charter and the rights of the minority have disappeared "in the dark backward and absym of time". But, as shown by the federal corporation's stockholders meetings since entry of the judgment, the corporation still flourishes in a kind of twilight zone for the sole use and profit of its 97% stockholder. We believe that the situation calls for the exercise of this Court's power in the interests of law, consistency and justice. Citizens holding stock in an existing federal corporation are entitled to a day in court to ascertain the present assets of the corporation and whether its 97% stockholder is entitled to their free enjoyment.

Conclusion

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully requested that rehearing be granted and that, upon such rehearing, writ of certiorari issue to the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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May, 1957.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the rules of this Court.

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